

No. 14912

United States
Court of Appeals
for the Ninth Circuit

ANNE G. MOHOLY, as Administratrix of the
Estate of PHILIP F. MOHOLY, Deceased,
and ANNE MOHOLY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

JUN 25 1955

PAUL R. HANSEN, CLERK



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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	9
Bond on Appeal.....	22
Certificate of Clerk.....	39
Complaint	3
Ex. A—Claim for Refund.....	7
Counsel, Names and Addresses of.....	1
Judgment	20
Memorandum Opinion	14
Notice of Appeal	21
Order for Judgment.....	13
Order of Substitution of Party Plaintiff.....	12
Points on Which Appellants Rely.....	42
Stipulation for the Substitution of Party Plaintiff	11
Transcript of Proceedings.....	24
Witnesses:	
Nelson, Ralph R.	
—direct	33
—cross	37
Shroeder, William J.	
—direct	25

NAMES AND ADDRESSES OF COUNSEL

SHERWOOD AND LEWIS,
703 Market Street,
San Francisco 3, California,
Counsel for Appellants.

HON. H. BRIAN HOLLAND,
Asst. U.S. Attorney General;
Tax Division, Dept. of Justice, Washing-
ton, D. C.

LLOYD H. BURKE,
United States Attorney,
Post Office Building,
San Francisco, California,
Counsel for Appellee.

On appeal from the United States District Court
for the Northern District of California,
Southern Division.

Decision of the Honorable Edward P. Murphy,
District Judge.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 33489

PHILIP F. MOHOLY and ANNE MOHOLY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR REFUND OF INCOME
TAXES ILLEGALLY COLLECTED

Now Come the above-named plaintiffs and complain of the above-named defendant, and for cause of action allege:

I.

That the defendant United States of America is a corporation sovereign and body politic; that plaintiffs are now and at all times herein mentioned have been citizens of the United States and residents of the City and County of San Francisco, State of California, and within the said Northern District of California; that the Court has jurisdiction over this matter under the provisions of Title 28, Sections 1340 and 1346, United States Code.

II.

That at all times during the year 1949 plaintiffs Philip F. Moholy and Anne Moholy were husband

and wife; that within the time allowed by law therefor, plaintiffs caused to be prepared, executed and filed their joint income tax return for the year 1949; that said income tax return was filed with the Collector of Internal Revenue at San Francisco, California, and said return showed that plaintiffs had a gross income during the year 1949 of \$4,872.00 and that there had been withheld from the wages of plaintiff Philip S. Moholy and paid by the City and County of San Francisco to the Collector of Internal Revenue at San Francisco the sum of \$535.20; that the total tax shown by said return to be due from plaintiffs to defendant was \$529.00, and the sum of \$6.20 representing the difference between the sum withheld and the tax shown on the return was credited or refunded to plaintiffs.

III.

That during the year 1949, plaintiff Philip F. Moholy was employed as a Fireman of the City and County of San Francisco and sustained personal injuries during the performance of his duties as a Fireman, resulting in his disability for 68 days; that said Philip F. Moholy was also ill and unable to work for 35 days during the year 1949, and for the total of 103 days of such disability and sickness he received the sum of \$13.33 per day from the City and County of San Francisco, or a total of \$1,373.00; that said sum was paid to the plaintiffs pursuant to the provisions of the Workmen's Compensation Insurance and Safety Act of the State of California implementing the provisions of the

Charter and Ordinances of the City and County of San Francisco or in the alternative as accident or health insurance; that the said sum of \$1,373.00 received by said Philip S. Moholy during the calendar year 1949, as aforesaid, should be excluded from the gross income of the plaintiffs under the provisions of IRC Sec. 22B(5) as "amounts received through accidents or health insurance or under workmens' compensation acts as compensation for personal injuries or sickness."

IV.

That at all times herein mentioned plaintiffs kept their books of account and filed their income tax returns on the calendar-year basis and on the cash basis of accounting; that by reason of the inclusion of said sum of \$1,373.00 in the income of these plaintiffs for the year 1949, said plaintiffs overpaid their income tax to the defendant for the year 1949 in the sum of \$209.00.

V.

That on or about the 14th day of March, 1953, and within the time allowed by law therefor, plaintiffs caused to be prepared, executed and filed with the Director of Internal Revenue at San Francisco, California, a Claim for the refund of said sum of \$209.00 collected and retained by the said defendant; that a copy of said refund Claim is marked Exhibit A and annexed hereto and is incorporated herein with the same force and effect as if herein set forth

in haec verba; that more than six months has elapsed from the date of filing said refund Claim; that the Commissioner of Internal Revenue has never granted said refund Claim, and that plaintiffs hereby elect to consider said Claim rejected.

VI.

That no part of said sum of \$209.00 ever was or is legally owing or payable to the said defendants as and for an income tax of plaintiffs for the calendar year 1949 or for any period or otherwise or at all; that said amount and the whole thereof was erroneously collected by defendant from plaintiffs; that no part of said sum has been repaid or scheduled for refund to plaintiffs and the whole thereof, together with interest thereon from March 15, 1950, is now due, owing and unpaid from defendant unto plaintiffs.

Wherefore, plaintiffs pray for judgment against defendant in the sum of \$209.00, together with interest thereon from March 15, 1950, and for such other or further relief as may be meet and just in the premises.

/s/ CLYDE C. SHERWOOD,

/s/ JOHN V. LEWIS,

Attorneys for Plaintiffs.

EXHIBIT A

Form 843,
U.S. Treasury Department.

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the
kind of claim filed, and fill in, where required,
the certificate on the back of this form

- Refund of Taxes Illegally, Erroneously, or
Excessively Collected.
- Refund of Amount Paid for Stamps Un-
used, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable
to estate, gift, or income taxes).

[Collector's Stamp]: Received March 14, 1953,
Director Int. Rev., San Francisco, 83.

94

Name of taxpayer or purchaser of stamps: Philip
F. and Anne Moholy.

Address: c/o Sherwood and Lewis, 703 Market
Street, San Francisco, California.

1. District in which return (if any) was filed:
First California.
2. Period (if for tax reported on annual basis,
prepare separate form for each taxable year):
From Jan. 1, 1949, to Dec. 31, 1949.

3. Kind of tax: Income.
4. Amount of assessment, \$529.00; dates of payment on or Before March 15, 1950.
* * *
6. Amount to be refunded: \$209.00 or Such Greater Amount as is Legally Refundable.
* * *

Adjusted gross income and taxable net income for the above specified taxable year have been overstated by the sum of \$1,373.00.

Taxpayer husband during the taxable year was employed as a fireman by the City and County of San Francisco and sustained personal injury or sickness during the term of this employment. The above-mentioned sum represents amounts received, through health or accident insurance or under Workmen's Compensation Acts, as compensation for personal injuries or sickness and/or as damages on account of such injuries or sickness. Said amounts were paid to taxpayer husband as sickness benefits under a health insurance plan maintained by his employer, the City and County of San Francisco, for the protection of its employees and/or as Workmen's Compensation benefits or disability payments for personal injuries or illness arising in the course of employment, pursuant to the provisions of the Workmen's Compensation Insurance and Safety Act of the State of California and implementing provisions of the charter and ordinances of the City and County of San Francisco.

Taxpayer's income tax return for the above-specified taxable year is incorporated by reference herein.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ PHILIP F. MOHOLY,

/s/ ANNE MOHOLY.

Dated March 14, 1953.

Duly verified.

[Endorsed]: Filed April 13, 1954.

[Title of District Court and Cause.]

ANSWER

The United States of America, by its attorney, Lloyd H. Burke, United States Attorney for the Northern District of California, answers as follows:

1.

Admits the allegations of Paragraph I of the Complaint.

2.

Denies the allegations of Paragraph II of the Complaint, except it is admitted that at all times during the year 1949, plaintiffs, Philip F. Moholy

and Anne Moholy, were husband and wife; that within the time allowed by law plaintiffs caused to be prepared, executed and filed their joint income tax return for the year 1949; that said income tax return was filed with the Collector of Internal Revenue at San Francisco, California; and said return showed that plaintiffs had a gross income during the year 1949 of \$4,972.00 and that there had been withheld from the wages of plaintiff, Philip F. Moholy, and paid by the City and County of San Francisco to the Collector of Internal Revenue at San Francisco, the sum of \$535.20; and that the total tax shown by said return to be due from plaintiffs to defendant was \$544.00, and the sum of \$8.80 representing the difference between the sum withheld and the tax shown on the return was remitted to the defendant.

3.

Defendant is without information and knowledge sufficient to form a belief as to the truth of the allegations of Paragraph III, and they are accordingly denied.

4.

Denies the allegations of Paragraph IV, except it is admitted that during the calendar year 1949, plaintiffs kept their books of account and filed their income tax returns on the calendar year basis and on the cash basis of accounting.

5.

Denies the allegations of Paragraph V, except it is admitted that on March 14, 1953, plaintiffs timely

filed with the Director of Internal Revenue at San Francisco, California, a claim for refund of said sum of \$209.00 collected and retained by this defendant; that a copy of said claim is attached and marked Exhibit A; and that more than six months has elapsed from the date of filing thereof without formal disallowance by the Commissioner of Internal Revenue.

6.

Denies the allegations of Paragraph VI, except it is admitted that no part of said \$209.00 collected by defendant from plaintiffs has ever been repaid or scheduled for refund to the plaintiffs.

Wherefore, defendant prays that the plaintiffs' Complaint be dismissed and that the defendant be awarded its costs in this behalf expended.

/s/ LLOYD H. BURKE,
United States Attorney.

Affidavit of mail attached.

[Endorsed]: Filed August 11, 1954.

[Title of District Court and Cause.]

STIPULATION FOR THE SUBSTITUTION
OF ANNE G. MOHOLY AS ADMINISTRA-
TRIX FOR PHILIP F. MOHOLY, DE-
CEASED.

It Is Hereby Stipulated by the above-named parties, acting by and through their respective at-

torneys, that the Court may make an order without notice substituting Anne G. Moholy as Administratrix of the estate of Philip F. Moholy, deceased, in the place and stead of Philip F. Moholy as one of the plaintiffs in the above-entitled action.

Dated: November 11, 1954.

SHERWOOD AND LEWIS,

By /s/ JOHN V. LEWIS,

Attorneys for Plaintiffs.

/s/ LLOYD H. BURKE,

United States Attorney,

Attorney for Defendant.

[Endorsed]: Filed November 17, 1954.

[Title of District Court and Cause.]

ORDER SUBSTITUTING ANNE G. MOHOLY
AS ADMINISTRATRIX OF THE ESTATE
OF PHILIP F. MOHOLY, DECEASED,
FOR PHILIP F. MOHOLY AS ONE OF
THE PLAINTIFFS IN THE ABOVE-EN-
TITLED ACTION

Pursuant to the Stipulation of the Parties, acting by and through their respective counsel, and the Court being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that Anne G. Moholy, the Administratrix of the estate of Philip F. Moholy, deceased, is hereby sub-

stituted as a party plaintiff in the place and stead of Philip F. Moholy, who is named as one of the plaintiffs in the above-entitled action.

Dated: November 17, 1954.

/s/ OLIVER J. CARTER,
District Judge.

[Endorsed]: Filed November 17, 1954.

[Title of District Court and Cause.]

ORDER

Judgment will be entered for the plaintiffs for that portion of the tax attributable to disability payments only. That portion of the tax attributable to sick leave payments was properly assessed and will not be included in the judgment for the plaintiffs.

I will file at a later date a memorandum opinion which, together with the stipulated facts, will constitute findings of fact and conclusions of law.

Dated: March 31, 1955.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed March 31, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Murphy, District Judge.

This is a tax refund suit. In a joint return for the taxable year 1949, plaintiffs included as income:

(a) Nine Hundred (\$900.00) Dollars received by Philip Moholy as disability pay from the City and County of San Francisco. Moholy, a Captain in the City Fire Department, was thrown from a fire truck while answering an alarm. He was incapacitated for 68 days.

(b) Four Hundred Eighty-nine and 17/100 (\$489.17) Dollars received as sick pay. Captain Moholy was ill with bronchitis and was unable to work for a period of 35 days. This money was paid to him pursuant to the provisions of the City Charter, Ordinances and Regulations.

Plaintiffs filed a claim for refund with the Commissioner for the tax attributable to these two amounts. The Commissioner did not act upon the claim during the statutory six months.

Plaintiff contends that these amounts are excludable from gross income under Section 22(b)(5) of the Internal Revenue Code as it existed in 1949. That section provided as follows:

“I.R.C. Sec. 22 * * *

“(b) Exclusions from Gross Income—The following items shall not be included in gross

income and shall be exempt from taxation under this chapter: * * *

“(5) Compensation for injuries or sickness.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 23(x) in any prior taxable year, amounts received, through accident or health insurance or under workmen’s compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness, and amounts received as a pension, annuity, or similiar allowance for personal injuries or sickness resulting from active service in the armed forces of any country; * * * (emphasis added).

The plaintiff contends and the government has conceded that the Nine Hundred (\$900.00) Dollars received as a result of Captain Moholy’s injury constitutes “amounts received under Workmen’s Compensation Act for personal injuries.”

The only question remaining is whether the Four Hundred Eighty-nine and 17/100 (\$489.17) Dollars received as such leave pay is excludable from gross income as “amounts received through accident or health insurance” as those words are used in the statute.

Those amounts were paid pursuant to Section 153 of the Charter of the City and County of San

Francisco and Rule 32, section 11, adopted by the Civil Service Commission.

Section 153 provides as follows:

“The Civil Service Commission by rule and subject to the approval of the board of supervisors by ordinance, shall provide for leaves of absence, due to illness or disability, which leave or leaves may be cumulative, if not used as authorized, provided that the accumulated unused period of sick leave shall not exceed six (6) months, regardless of length of service, and provided further that violation or abuse of the provisions of said rule and ordinance by any officer or employee shall be deemed an act of insubordination and inattention to duties.”

Rule 32 provides as follows:

“Police and Fire Departments: Sick leaves and disability leaves granted to members of the uniformed forces of the Police Department and Fire Department shall be regulated by rules adopted respectively by the Police Commission and Fire Commission which rules, and amendments thereto, shall be subject to the approval of the Civil Service Commission, and when so approved by the Civil Service Commission shall be deemed as included in this rule. (Sick leave rules of the Fire Department approved Minutes of April 18, 1945. Sick leave rules of the Police Department approved as amended Minutes of February 15, 1950).”

The Sick Rule generally provides that members

of the Fire Department who have regularly occupied their positions continuously for at least one year are entitled to two weeks' "sick leave with full pay." When not used the sick leave is cumulative for a period not to exceed six months.

The argument was principally directed to the question of whether the various provisions of the sick rule coincided with provisions found in normal commercial health insurance and whether these charter provisions are "a contract whereby one undertakes to indemnify another against loss, damage or liability arising from a contingent or unknown event." (California Insurance Code, sec. 22).

The government contends that these sick leave payments are part of an employee's bargained-for compensation for his work; that there is no risk to be insured against since there is no loss of wages and that there is no spreading of the risk.

The plaintiff counters by saying these payments are not wages (citing *Adams vs. City and County of San Francisco*, 94 C.A. 2d 586 [1949]), that there is a risk of sickness; that the government's reasoning regarding no risk is circular in that the only reason there would be no risk is that the employer has contracted to assume that risk.

All this is interesting. But the problem is not whether the system setting up these payments is like health insurance. The problem is whether the payments are "amounts received through accident or health insurance" as those words are used in the Act. While their meaning in the statute is not free

from doubt, I take it that the words were used in their ordinary service. Cf. *Waller vs. U. S.*, 180 F. 2d 194 (App. D. C. 1950). "Sick leave with full pay" is an ordinary, well-understood phrase. "Health insurance" is likewise an ordinary, well-understood phrase. Taking their ordinary meaning they are not the same. Sick leave pay is just not "amounts received through health insurance."

If Section 105 (d) of the Internal Revenue Code of 1954 has any relation to this problem at all, it shows that Congress can use plain words to exclude these types of payment from gross income.

Two points remain to be made. *Adams vs. City and County of San Francisco*, 94 Cal. App. 2d 586 (1949), did not hold that payments received under Section 153 were not part of the Wage Contract. The question there decided was that the words "such rate of pay" used in Section 151.3 of the Charter did not include "sick leave and disability leave" within Section 153, but did include the schedules of compensation recommended by the Civil Service Commission after investigation and survey and based upon the prevailing hourly or per diem rate including an allowance for annual vacation under Section 151 of the Charter. This is a problem of construction of a section of the City Charter. It has nothing to do with whether the sick leave payments are wages.

Epmeier vs. U. S., 199 F. 2d 508 (7th Cir. 1952) discusses the problem of whether amounts are re-

ceived "through accident and health insurance" in terms of whether the plan is like commercial insurance. It does not appear whether those payments were full pay for sick leave. It does appear that the employer was an insurance company authorized to, and actively engaged in writing disability insurance as compensation for personal injuries and sickness. The employee's plan was the equivalent of a commercial policy. I do not read Epmeier as holding that all payments by an employer of full pay when the employee is on sick leave are excludable from gross income.

This memorandum together with the stipulated facts will constitute the findings of fact and conclusions of law required by the Rule. The parties have stipulated that they will recompute the tax due. Let a draft of the judgment be prepared and submitted in accordance with the local Rule.

Dated: May 31st, 1955.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed May 31, 1955.

In the United States District Court for the
Northern District of California, Southern Di-
vision

Civil No. 33489

ANNE G. MOHOLY, as Administratrix of the
Estate of PHILIP F. MOHOLY, Deceased,
and ANNE MOHOLY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This action came on regularly to be heard without a jury before the above-entitled Court, the Honorable Edward P. Murphy presiding, on November 30, 1954. Plaintiffs appeared by Clyde C. Sherwood, Esq., and John V. Lewis, Esq. Defendant appeared by Lloyd H. Burke, Esq., United States Attorney for the Northern District of California, and George A. Blackstone, Esq., Assistant United States Attorney. Evidence having been introduced and the Court having adopted its memorandum opinion filed May 31, 1955, as its findings of fact and conclusions of law, and the parties having agreed upon the amount of judgment,

Now, Therefore, by reason of the law and the evidence and the findings of fact and conclusions of law aforesaid,

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs recover from defendant the principal

sum of \$134.00, together with interest thereon in the sum of \$42.99, without costs.

Dated: August 3rd, 1955.

/s/ EDWARD P. MURPHY,
United States District Judge.

Affidavit of Mail attached.

Lodged July 21, 1955.

[Endorsed]: Filed August 3, 1955.

Entered August 4, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now the plaintiffs, appearing by Clyde C. Sherwood and John V. Lewis, their attorneys, and hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the above-entitled case by the United States District Court for the Northern District of California in favor of defendant and against said plaintiffs, on August 3, 1955.

Dated: Sept. 21, 1955.

SHERWOOD & LEWIS,
By /s/ CLYDE C. SHERWOOD,
By /s/ JOHN V. LEWIS,
Attorneys for Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 22, 1955.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, Anne G. Moholy, Administratrix of the Estate of Philip F. Moholy, Deceased; Anne G. Moholy, Plaintiffs and Appellants in the above-entitled action, have appealed to the United States Court of Appeals for the Ninth Circuit, from a judgment made and entered against them in the District Court of the United States for the Northern District of California, Southern Division, in favor of the Defendant in said action, on the 10th day of October, 1955; and

Whereas, the said appellants are required to give an undertaking for costs on appeal as hereinafter conditioned.

Now, Therefore, Hartford Accident and Indemnity Company of San Francisco, California, in consideration of the premises, hereby undertakes on the part of the said appellants and acknowledges itself bound to the said Defendant in the sum of Two Hundred Fifty and No/100 Dollars (\$250.00) that the said appellants will pay all costs which may be adjudged against them on said appeal or on a dismissal thereof, not exceeding, however, the sum of Two Hundred Fifty and No/100 Dollars (\$250.00).

It Is Further Stipulated as a part of the foregoing undertaking that in case of the breach of any condition thereof, the above-entitled District Court may, upon notice to the Surety of not less than 10 days, proceed summarily in said proceedings to ascertain the amount which the said surety is bound to pay on account of such breach and render judg-

ment therefor against the said surety and award execution thereof.

Signed, sealed and dated this 10th day of October, 1955.

[Seal] HARTFORD ACCIDENT AND
 INDEMNITY COMPANY,
By /s/ TREVOR R. LEWIS,
 Attorney-in-Fact.

State of California,
City and County of San Francisco—ss.

On this 10th day of October, in the year one thousand nine hundred and fifty-five, before me, Rosaline W. Leong, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Trevor R. Lewis, known to me to be the Attorney-in-Fact of the Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office, in said City and County of San Francisco, the day and year in this certificate first above written.

/s/ ROSALINE W. LEONG,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission will expire April 30, 1957.

Premium on this Bond is \$10.00.

[Endorsed]: Filed October 11, 1955.

The United States District Court, Northern District
of California, Southern Division

No. 33489

PHILIP F. MOHOLY and ANNE MOHOLY,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

Before: Hon. Edward P. Murphy, Judge.

REPORTER'S TRANSCRIPT

November 30, 1954

Appearances:

For the Plaintiffs:

SHERWOOD & LEWIS, By
CLYDE C. SHERWOOD, ESQ., and
JOHN V. LEWIS, ESQ.

For the Government:

LLOYD H. BURKE, ESQ.,
United States Attorney, By
GEORGE A. BLACKSTONE, ESQ.,
Assistant U. S. Attorney.

November 30, 1954, at 10:00 A.M.

The Court: The Court is familiar with the pleadings. You may proceed.

Mr. Sherwood: Does Your Honor wish any opening statement or shall I just call the witness?

The Court: Not necessarily. You can call your witness.

Mr. Sherwood: I would like to call Mr. Shroeder.

WILLIAM J. SHROEDER

called as a witness on behalf of the plaintiffs; sworn.

The Clerk: State your full name.

A. William J. Shroeder.

Q. Where do you reside?

A. San Francisco.

Q. What is your occupation?

A. Supervisor of payrolls, City and County of San Francisco.

Direct Examination

By Mr. Sherwood:

Q. You are here pursuant to a subpoena which was served upon the Controller, Harry D. Ross?

A. Yes.

Q. You were asked to bring with you records pertaining to payments made to the late Captain Philip Francis Moholy? A. Yes.

Q. Do you have those records? [3*]

A. I have transcripts of the records. These are copies signed by the Controller of the time rolls. In fact, the period in which Mr. Moholy was either sick or disabled, and this is the breakdown.

Mr. Sherwood: I will show these to counsel (handing to counsel).

Q. I note, Mr. Shroeder, that on these schedules

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

(Testimony of William J. Shroeder.)

there are certain letters. For instance, there is a letter S. What does that indicate?

A. The symbol SP means sick leave with pay.

Q. There is also the letters DP.

A. Disability leave with pay.

Q. In other words, the days here that are marked SP indicate dates when Mr. Moholy received sick payments? A. That's right.

Q. And DP, that is disability payments?

A. That's right.

Q. Have you made a summary of the information shown on these sheets?

A. Yes, I have. This is the summary that I made, showing the method used in arriving at the amounts paid to Mr. Moholy for sick leave and disability leave.

Mr. Sherwood: I would like to offer, Your Honor, a transcript certified by the Controller of the official records, the Controller of the City and County of San Francisco, [4] showing the payments for disability and for sickness made to the plaintiff for the calendar year 1949.

The Court: Any objections?

Mr. Blackstone: No objection.

The Court: Let them be marked.

(Thereupon transcript of official records, Controller's Office, City and County of San Francisco, disability and sickness payments, 1949, was received in evidence and marked Plaintiff's Exhibit No. 1.)

(Testimony of William J. Shroeder.)

Mr. Sherwood: And also I would like to, if there is no objection, introduce a summary sheet which is merely a summarization for the convenience of the information set forth on those large sheets.

The Court: It may be received.

(Thereupon summarization referred to above was received in evidence and marked Plaintiff's Exhibit No. 2.)

The Court: Is that summary broken down into sick leave and disability?

Mr. Sherwood: Yes, Your Honor. The summary, I might state for the record, shows \$489.17 paid as sick leave and \$900.00 paid for disability pay.

The Court: How much was the sick leave?

Mr. Sherwood: \$489.17. [5]

The Court: All right.

Mr. Sherwood: You may cross-examine.

Mr. Blackstone: No questions, Your Honor.

(Witness excused.)

Mr. Sherwood: I have asked the actuary for the Retirement Board to step over. We phoned him and while he's on his way over I would like to offer some documentary evidence in support of the proceedings.

The Court: All right.

Mr. Sherwood: I have here the Charter of the City and County of San Francisco, as it was in effect during the year 1949. I might say, Your Honor, that the Charter was amended in 1951 and effective in 1952, March 10th. The Government concedes that

monies received for disability payments after that date are excludable, so the Charter provisions as they existed prior to the amendment are the ones that are pertinent to the decision of this case.

I have made copies of two sections which I think the Court will probably want to look at.

I would like to offer the whole charter because it is a published document, it is in the libraries, available to the Court and counsel. And then I would like to withdraw the Charter and I would like leave to place in evidence copies of two sections.

The Court: They are the pertinent sections? [6]

Mr. Sherwood: With the understanding that any of us may refer to any other section that might be necessary, in the briefs, if the Court shall ask for briefs.

The Court: All right. Let the Charter be received and let it be withdrawn.

(Thereupon Charter of City and County of San Francisco was received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Sherwood: I would like to leave in evidence as part of this Charter Section 153 of the Charter and Section 172 of the Charter.

I understand that this Court will take judicial notice of the statutory law of the State of California, but, for purposes of convenience, I have copied Sections 3201, 3202, 3300, 3351 and 3700 of the Labor Code of the State of California, which I would like to offer.

The Court: Very well.

Mr. Sherwood: Perhaps it would be better if I offered the Labor Code of the State of California and then——

The Court: Let's follow the same procedure as you did with the Charter.

Mr. Sherwood: Very well, I will offer then the Labor Code of the State of California, as it existed in 1949.

The Court: All right, let it be received.

Mr. Sherwood: I would like to withdraw it and substitute [7] these extracts.

The Court: Let it be received in evidence and withdrawn.

(Thereupon Section 153 of the Charter of the City and County of San Francisco was received in evidence and marked Plaintiff's Exhibit 4; Section 172 was received in evidence and marked Plaintiff's Exhibit No. 5.)

(Labor Code of the State of California was received in evidence and marked Plaintiff's Exhibit No. 6; Sections 3201, 3202, 3300, 3351 and 3700 were received in evidence and marked Plaintiff's Exhibit No. 6A.)

Mr. Sherwood: I would like to offer in evidence the California Insurance Code as it existed in 1949, and withdraw the code and leave in evidence Section 22 and Section 106 of the California Insurance Code.

The Court: So ordered.

(Thereupon California Insurance Code was

received in evidence and marked Plaintiff's Exhibit No. 7; pertinent sections thereof were received in evidence and marked Plaintiff's Exhibit No. 7A.)

Mr. Sherwood: I have furnished counsel with copies of the rules of the Civil Service Commission as they were in effect in 1949, and I would like to offer in evidence the [8] rules of the Civil Service Commission of San Francisco. These are marked effective September 1, 1947, and they were in effect until 1951.

The Court: The rules may be received in evidence. Are there any pertinent sections to which you refer?

Mr. Sherwood: Yes, Your Honor. There may be other things that the Court will want to look at, but in particular the pertinent section here is Rule 32, with particular reference to Section 7 and Section 11 of Rule 32.

I might say, the pertinency of Section 11 is that by that section, Section 11, the Police and Fire Departments are given the right to make their own rules instead of following the rules outlined by the Civil Service Commission, they are given the power to make their own rules, subject to approval by the Civil Service Commission. And I have here, Your Honor, the rules of the Fire Department adopted pursuant to the provisions that I have just referred to, and I ask leave to offer in evidence the official manual of the Fire Department which states it was approved and adopted May 11, 1949.

Inasmuch as the injuries to Captain Moholy occurred in August of 1949, these rules would be applicable to that extent. I have agreed with the Captain of the Fire Department to return this book, if it meets with the Court's approval. I would like to offer the book in evidence, then withdraw it and substitute the rules on sick leave, which I have copied [9] from the book, copies of which I have given to counsel, and counsel has also examined the original. That is the rule adopted by the Fire Department pursuant to that authorization in the Civil Service rule.

The Court: Very well. Let the rule book be received in evidence and it may be withdrawn and the typewritten copy of the so-called sick rule may be received in evidence.

(Thereupon rules of Civil Service Commission, City and County of San Francisco, were received in evidence and marked Plaintiff's Exhibit No. 8.)

(Official manual of Fire Department was received in evidence and marked Plaintiff's Exhibit No. 9; pertinent sections were received in evidence and marked Plaintiff's Exhibit No. 9A.)

The Court: These rules of the Civil Service Commission you are not withdrawing?

Mr. Sherwood: No, Your Honor, I think we should have them all in. Fortunately, they are printed copies and they were available.

I have, Your Honor, copies of documents supplied Mrs. Moholy by the Fire Department, being copies of the records of the Fire Department; I think perhaps I could offer them all as one exhibit because they were all part of the Fire Department's records.

One of them is entitled, "Report of Injury." [10]

The second one is on the form of the Industrial Accident Commission, "Physician's or Surgeon's report of injury to the Department of Industrial Relations of the State of California."

The Court: There isn't any question about the fact that the captain was injured?

Mr. Sherwood: Well, Your Honor, there isn't any question in my mind about the fact that this compensation is exempt. I have never yet found anybody—

The Court: What I am getting at, what is the purpose of introducing those reports?

Mr. Sherwood: I just want to show that he was injured while performing—answering a call to a fire.

Mr. Blackstone: There is no question.

The Court: I would imagine that would be stipulated to by the Government.

Mr. Blackstone: Yes, there is no question about that, Your Honor. We are only arguing questions of law, so far as the Government is concerned. I don't see any useful purpose to be served by the introduction of these records. If you want to put them in, it's perfectly satisfactory with me. I am just wondering whether you are not unduly encumbering the record.

Mr. Sherwood: They do make a complete record.

Suppose I just offer these two, the report of the injury and the Industrial Accident paper. [11]

The Court: All right, let them be received.

(Thereupon report of injury and report of Physician or Surgeon were received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Sherwood: If Your Honor please, I am completely in the dark as to the defense in this matter on this particular phase of the case, and so I am just trying to——

The Court: Mr. Blackstone just indicated that he is willing to concede that the captain was injured in the performance of his duty while answering a call to a fire.

Is that correct, Mr. Blackstone?

Mr. Blackstone: Yes, Your Honor.

RALPH R. NELSON

Called as a witness on behalf of the plaintiffs; sworn.

The Clerk: State your full name.

A. Ralph R. Nelson.

Q. Where do you reside?

A. 449 Selby Lane, Atherton, California.

Q. What is your occupation?

A. Consulting actuary.

Direct Examination

By Mr. Sherwood:

Q. By whom are you employed?

A. On a part-time basis by the City and County of San Francisco. [12]

(Testimony of Ralph R. Nelson.)

Q. Have you held other positions with the City and County of San Francisco?

A. Yes, prior to the time I entered the status of consulting actuary in 1948, I was secretary-actuary of the Retirement Board.

Q. When did you become secretary-actuary of the Retirement Board?

A. I first became secretary in 1921, and became secretary-actuary in about 1923.

Q. And you have some familiarity, I believe, with Section 172 of the Charter of the City and County of San Francisco?

A. Yes, I have.

Q. I understand you actually drafted it.

A. Yes. The section originally was drafted when the so-called new charter was adopted in 1932, and it has been amended since then, of course.

Q. In the Retirement Board, do you have any occasion to have any familiarity with records concerning Workmen Compensation payments?

A. Yes, I have. I personally administered the benefit provisions of the code with respect to City and County employees beginning in 1932.

Q. You have administered the benefits since 1932?

A. That's right.

Q. Do you have in your official records any [13] record pertaining to Captain Philip Francis Moholy for the year 1949?

A. Yes, we have the records dealing with him and particularly beginning with August, 1949.

Q. Will you state what your records show?

A. Our records show that he was injured on

(Testimony of Ralph R. Nelson.)

August 24, 1949, while in performance of duty and that he was treated at the San Francisco Hospital, in Ward 1, which was under the jurisdiction of the Retirement System, and the treatment being furnished in line with the Labor Code.

Q. And who pays for the hospitalization and other expenses, such as doctors?

A. The City and County paid for it through the Retirement Office, appropriations being made to us and payment being made directly from our appropriation to the City and County of San Francisco, and particularly the hospital.

Q. In a conversation the other day on the telephone, you stated that you had charge of administering the Workmen Compensation benefits by virtue of a resolution of the Retirement Board, is that right?

A. That's right.

Q. And is this document that you have just handed me a true copy of the resolution?

A. Yes. There are two resolutions. First, the resolution adopted July 26, 1932, under the so-called new charter becoming effective in January of [14] 1932.

Q. That is under Section 172?

A. That's right. Which authorized me as secretary-actuary at that time to administer the compensation law as it applied to City and County Employees.

Then when my status changed in 1946 to that of consulting actuary, a resolution was adopted on April 3, 1946, giving or extending this same author-

(Testimony of Ralph R. Nelson.)

ity to me in my new status, and these two sheets here give—these are certified copies of those two resolutions.

Mr. Sherwood: I would like to offer, Your Honor, the original of the two resolutions which the witness has just testified to as the basis for his authority under the Charter for administering the Workmen Compensation provisions of the Labor Code.

The Court: So received.

(Thereupon resolutions of Retirement Board were received in evidence and marked Plaintiff's Exhibit No. 11.)

Q. (By Mr. Sherwood): Do you make a report to the Industrial Accident Commission of cases involving disability payments covered by the Labor Code?

A. We file a medical report on the Industrial Accident Commission's Form No. 21, and did file it in this case, and we—

Q. Before you came to court we put into evidence this copy. [15] I wonder if this is the same one you refer to—you probably have the original (handing to witness).

A. Yes, it is. I have a copy signed by the physician himself, that is, Dr. Roberts, who made that out.

Mr. Sherwood: That is Plaintiff's Exhibit No. 10, Your Honor. I didn't know whether the copy would be accepted or not, and I asked the witness to

(Testimony of Ralph R. Nelson.)

bring the original. But there is no use in putting it in evidence.

You may cross-examine.

Cross-Examination

By Mr. Blackstone:

Q. Mr. Nelson, your testimony relates only to the disability payments made to Mrs. Moholy, is that correct? Did you have anything to do with the sick leave payments?

A. No. We had nothing to do with the sick leave payments, but I was testifying as to the jurisdiction of the Retirement Board over this case from the beginning.

Q. Well, you were talking about payments made to Mr. Moholy for injuries received in the line of duty, is that correct?

A. Well, actually I didn't talk about payments made to him. I talked about payments made in his behalf for medical and hospital service under the Labor Code. Now, under——

Q. Are you talking about payments arising from injury resulting from the performance of his duty?

A. That's right. [16]

Mr. Blackstone: I have no further questions.

(Witness excused.)

Mr. Sherwood: I think that's the plaintiff's case, Your Honor.

The Court: Very well.

Mr. Blackstone: May it please the Court, the Government has no witnesses. As I indicated earlier, we believe this comes down to a question of law.

Mr. Sherwood: May I interrupt just one moment, counsel? Mr. Lewis reminds me that on the matter of the recomputation of the amount to be refunded in the event the Court decides either of our contentions in favor of the plaintiff—I discussed the matter with Mr. Blackstone the other day and he has the original income tax return; I find that the figures that I have in my complaint are erroneous by a few dollars and the figures set forth in the answer are correct.

The Court: In the answer?

Mr. Sherwood: In the answer. Perhaps the original return should be put in evidence.

The Court: I don't think it is necessary.

Mr. Blackstone: I don't think it is necessary.

Mr. Sherwood: Mr. Blackstone suggested we stipulate after the Court renders a decision that he and I will agree upon computations to be submitted to the court; in other words, we can make the computations pursuant to any findings [17] that the Court makes and submit them to the Court.

Mr. Blackstone: In the event there is a decision for the plaintiff.

Mr. Sherwood: In the event there is a decision for plaintiff. Well, I assumed there would be.

The Court: You may be assuming something not in evidence.

I would like a little brief on this matter. Do you

want to take ten, five and ten, or do you want more time?

Mr. Blackstone: I would like to have a little more time to consult—Washington did indicate that if they did have further time to reflect on it, they might be able to concede the disability payment issue, but not the sick leave, and I thought that if perhaps we had, say, 30 days from today to get our brief in, giving Mr. Sherwood 15 days, Washington could have an opportunity to review this, and it might decide that it was advisable to withdraw any opposition to the refund based upon the disability payments, but I am quite confident they will not withdraw their opposition to a refund based on the sick leave payments.

The Court: Is that satisfactory?

(Matter submitted on briefs on 15-15 and 5 days.)

[Endorsed]: Filed October 17, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and they constitute the record on appeal herein as designated by the attorneys for the appellants:

Complaint.

Answer.

Stipulation for the Substitution of Party Plaintiff.

Order of Substitution of Party Plaintiff.

Order for Judgment.

Memorandum Opinion.

Judgment.

Notice of Appeal.

Appeal Bond.

Appellants' Designation of Record.

Reporter's Transcript of Trial Proceedings, November 30, 1954.

Plaintiff's Exhibits 1, 2, 4, 5, 6a, 7a, 8, 9a, 10 and 11.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of October, 1955.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ MARGARET P. BLAIR.

[Endorsed]: No. 14912. United States Court of Appeals for the Ninth Circuit. Anne G. Moholy, as Administratrix of the Estate of Philip F. Moholy, deceased, and Anne Moholy, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: October 24, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14912

ANNE G. MOHOLY, as Administratrix of the
Estate of PHILIP F. MOHOLY, Deceased,
and ANNE MOHOLY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Respondent.

POINTS ON WHICH APPELLANTS RELY

1. That the District Court of the United States for the Northern District, Southern Division, in Civil No. 33489, erred in excluding Four Hundred Eighty-nine and 17/100 Dollars (\$489.17) from gross income, under Section 22(b)5 of the Internal Revenue Code as it existed in 1941, received as sick pay by Philip F. Moholy, deceased, who was ill with bronchitis and unable to work for a period of 35 days. This money was paid him pursuant to the provisions of San Francisco City Charter, Ordinances and Regulations.

SHERWOOD & LEWIS,

By /s/ JOHN V. LEWIS,

Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 26, 1955.